



November 5, 2010

Submitted Online (www.regulations.gov)

Water Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Submitted by Email (vabaytmdl@dc.virginia.gov)

Department of Conservation and Recreation
Commonwealth of Virginia
203 Governor Street
Richmond, VA 23219

Re: EPA Water Docket ID No. EPA-R03-OW-2010-0736, Draft Total Maximum Daily Load ("TMDL") for the Chesapeake Bay; and Virginia Chesapeake Bay Watershed Implementation Plan ("WIP")

To Whom It May Concern:

Thank you for the opportunity to comment on EPA's Draft TMDL for the Chesapeake Bay and Virginia's WIP. The Virginia Nutrient Credit Exchange Association, Inc. ("Nutrient Exchange") consists of 72 participating member organizations that own and operate some 110 NPDES-regulated municipal and industrial facilities throughout Virginia's Chesapeake Bay watershed.

The Nutrient Exchange and its participant members have a major stake in the Bay TMDL and WIP, particularly given the investments and trading commitments that the member organizations have made in reliance on Virginia's point source nutrient allocations and trading laws and regulations. These wasteload allocations and trading provisions were adopted in furtherance of Virginia's strong commitment to implementation of the Chesapeake 2000 Agreement for attainment of water quality standards and to our understanding have been approved as well as praised by both Virginia and EPA.

Each participant member is a signatory to the Nutrient Exchange's Nutrient Credit Services Agreement. In accordance with this multi-party contract, the Nutrient Exchange maintains the Exchange Compliance Plan through Annual Updates that are reviewed and approved by the Virginia Department of Environmental Quality ("VADEQ") under the Virginia law (Va. Code § 62.1-44.19:14.C.3 and :17.A) and VADEQ's Chesapeake Bay Watershed General Permit Regulation (9VAC25-820).

The Nutrient Exchange strongly recommends that the EPA TMDL and the Virginia WIP be made consistent with Virginia's existing point source nutrient allocations as reflected in the Virginia Water Quality Management Planning Regulation, 9VAC25-720, and the Chesapeake Bay Watershed General Permit Regulation (9VAC25-820) and related Registration Lists. The Exchange Compliance Plan is premised on these allocations and any major changes by EPA or Virginia would be highly disruptive to this substantial plan that draws on approximately \$2 billion in capital improvement projects for nutrient purposes and related trading.

At page 10-4 of the Draft TMDL, EPA requested comment on whether its proposed offset provisions for new or increased nutrient or sediment loadings should apply to water quality trades in the Bay jurisdictions generally. The point-point trades under the VADEQ-approved Exchange Compliance Plan are in this latter category. While the TMDL should certainly acknowledge the availability of trading including that of the Nutrient Exchange as an assumption of the TMDL, we strongly advise and request that this specific question be answered "**NO**". The Nutrient Exchange strongly urges EPA **not** to apply the Appendix S proposed offset provisions for new/increased loads to existing point-point trading programs such as the Virginia program implemented by the Nutrient Exchange.

We take this position not because we are aware of any major inconsistencies of environmental importance between (1) the offset/trading provisions of the Draft TMDL and (2) Virginia's laws, regulations and policies and the Nutrient Exchange's compliance plan, policies and contracts developed consistent with Virginia law. However, a thorough analysis or comparison of that sort is in itself a major undertaking that simply cannot be performed within the short 45-day comment period. To the extent that EPA fails to adopt the Nutrient Exchange's position on the non-applicability of the proposed new/increased load offset provisions to trading under the Nutrient Exchange, the Nutrient Exchange hereby requests a 90-day extension of the comment period and the opportunity for EPA, Virginia and the Nutrient Exchange to work closely to perform this analysis together.

To this point and in support of our contingent request for an extension of the comment period, we note the following breadth and scope of the various documents implicated by any discussion of trading. EPA's Draft TMDL calls for consistency with six (6) lengthy and complex "source documents," a set of definitions, and a list of 10 "comment elements" with 38 sub-elements. Virginia's existing program includes a complex statute (Va. Code 62.1-44.19:12 et seq.), the Chesapeake Bay Watershed General Permit (9VAC25-820) (see Draft WIP at page 41), the VADEQ-approved Exchange Compliance Plan, and the Nutrient Exchange's 72-party Nutrient Credit Services Agreement. Indeed, the Watershed General Permit itself contains 30 definitions and 17 pages of requirements. The Nutrient Credit Services Agreement is a 30-page contract including among many other provisions some 39 definitions. The related Exchange Compliance Plan consists of hundreds of pages of associated facility plans and trades.

Most importantly, this Virginia point-point trading program is working remarkably well and has been widely praised as a national model, including receiving credit in EPA's own

publications. At this time, the Nutrient Exchange urges EPA to limit its consideration of new credit-related policies to the specific issue of offsetting new or increased loads.

As to the specific details proposed by EPA, we offer the following comments:

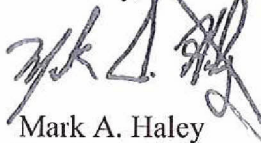
- NPDES Permit Noncompliance (Page S-4, Item 6 (b)) – This provision is irrelevant to trading and, in practice, certainly stands to disrupt trading. For trading to be reliable and useful for the users as well as the regulators, it makes no sense that otherwise valid nutrient credits would be disqualified upon noncompliance of the credit-generating facility. Consider just a few examples of potential noncompliance: failure to submit a complete renewal application or a required facility-related manual on time, laboratory testing errors, inadvertent exceedence of unrelated effluent limits, etc. This provision will only inject unnecessary uncertainty into the trading or offsetting process, would not “safeguard” nutrient trades, and actually would work against EPA’s stated objectives. This element should be eliminated.
- “Disproportionate Harm” (Page S-4, Item 6 (c)) – While the Nutrient Exchange aims to improve water quality and surely to do no harm, we note that this provision is redundant of the many provisions in Appendix S that state that trading or offsetting must be consistent with water quality standards applicable to human health and aquatic life. This provision is redundant of the standards that preclude harm by their own terms and, therefore, the provision should be deleted.
- “Temporal Consistency” (Page S-4, Item 6 (d)) – This provision should be clarified to provide that temporal consistency is satisfied for point sources when the credit is generated and used within the same 12 month period. This request is consistent with the annual basis for the TMDL and WLAs.
- “Accountability” Provisions (Page S-5, Item 8) – Much of this section is redundant of the previous seven items in Appendix S. However, a number of the items are worded slightly differently than those prior items. This may lead to confusion and further complicate implementation. We suggest deleting all sub-elements that are addressed elsewhere in the document.
- “Net Improvement Offsets” (Page 10-2) – This item is objectionable in that it requires a source to do more than fully offset its own load. This essentially would penalize one party that is achieving zero-discharge for its new or increased activity, by requiring that party to also clean up for another source that should do so but has not. This violates the most basic notions of fairness and due process, reflects poorly on government, and should be deleted.

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Thank you for your attention to these comments. If you desire any further information about this very important program in Virginia, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Mark A. Haley', is written over the word 'Sincerely,'.

Mark A. Haley
President

Copy to (by email w/o encl.):

Mr. David K. Paylor, VADEQ

Mr. Alan Pollock, VADEQ

Mr. Russ Perkinson, VADCR

Exchange Board of Governors

Exchange Participants

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